

Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES

AUGUST, 1977

NUMBER: 77-273

ROSALYN COLODNY and JEAN FELDMAN,
APPLICANTS,

VS.

R.A. KRAUSE, AS NOMINEE OF THE
TRUSTEE OF ATICO MORTGAGE INVESTORS
A MASSACHUSETTS BUSINESS TRUST.

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT

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RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT

The Petition of Rosalyn A. Colodny and Jean Feldman respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Georgia Court of Appeals in this matter rendered and filed on January 11, 1977.

OPINION BELOW

The opinion of the Court of Appeals of Georgia, reported as *Colodny et al., v. Krause*, 141 Ga. App. 134 (1977), appears in the Appendix hereto.

JURISDICTION

The judgment of the Georgia Court of Appeals was entered on January 11, 1977. A timely petition for rehearing was filed in the Court of Appeals and was denied by said Court on January 28, 1977.

Thereafter an Application for a Writ of Certiorari was filed in the Supreme Court of Georgia on February 28, 1977, and was denied by that Court on April 21, 1977. A Motion for Rehearing on said application for a Writ of Certiorari was filed on May 2, 1977, and was denied on May 11, 1977. The case was remanded to the Court of Appeals of Georgia on May 20, 1977 which forwarded the remittitur to the Fulton County Superior Court on that same date and judgment was

entered in that Court on May 23, 1977. This Petition for Writ of Certiorari was filed within ninety (90) days of that date. Certified copies of the minutes of the Georgia Court of Appeals and Supreme Court appear in the Appendix. This Court's jurisdiction is invoked under the provisions of 28. U.S.C.A. 1257(3).

QUESTIONS PRESENTED

1. Is it a denial of due process and equal protection as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, to bind a Defendant in a subsequent suit in the state of domicile to the results of a foreign judgment against her where that same foreign judgment was previously refused full faith and credit in the state of domicile for lack of notice or hearing in the foreign state?
2. Is it a denial of due process and equal protection as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, to enter an in personam judgment without notice of or holding a fair market value hearing in a subsequent suit in the state of domicile for a deficiency balance growing out of a previous real estate foreclosure in the foreign state?
3. Is the misapplication of a defensive plea of res judicata, resulting in two separate judgments against the same parties on the same debt, a denial of due process and equal protection as guaranteed by the United States Constitution, Fifth and Fourteenth Amendments?

STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment Five
United States Constitution, Amendment Fourteen

STATEMENT OF THE CASE

This case arose as the result of the petitioners' signing, together with their respective husbands, a guaranty agreement in 1972 to pay the debt of Concord Developers, Inc., with the Respondent for a construction loan of \$2,700,000.00. (R. 18). The corporation defaulted after \$481,034.42 was advanced and Respondent filed a Complaint for foreclosure and deficiency against Concord, the guarantors, inter alia, in Lexington County, South Carolina on March 22, 1974 (R. 4 31-39, 146-209). The Petitioners were served extraterritorially by the Sheriff's Office in Atlanta, Georgia, the state of their domicile, and return of service made and service shown in the record to have been defectively made upon them. (R. 46-47, 50-51, 198, 201). Because of lack of proper service, Petitioners did not appear or defend in South Carolina. However, the South Carolina action proceeded to judgment against the Corporation and the guarantors and a deficiency judgment was found and entered up against Petitioners in the amount of \$142,749.91 on June 27, 1974 which judgment stands of record in the state of rendition. (R. 42, 43, 151, 152).

Respondent then filed a Complaint in Georgia on October 24, 1974 to domesticate the South Carolina judgment against only the guarantors. (R. 5). Petitioners filed their Motion to Dismiss the Complaint based upon improper service upon them and filed defensive pleadings (R. 11). At a hearing held on June 2, 1975, the Fulton County Superior Court refused to grant full faith and credit to the South Carolina judgment as to the Petitioners and entered its Order accordingly (R. 96).

Respondent amended its Complaint on April 1, 1975 and added Count II which alleged the original note, guaranty and sought judgment against Petitioners for the same claim covered by the South Carolina judgement which had already been denied full faith and credit (R. 14). Said Complaint, as amended, sought no confirmation or fair market value hearing and plead no law vitiating that requirement nor did it make any allegations at all concerning a hearing or the

holding thereof for such purpose.¹ (R. 14).

Petitioners filed an answer to Count II and raised the defense of res judicata, among others (R. 56-59, 60). Petitioners later amended their answer and raised the constitutional questions here sought to be reviewed. (R. 214-215, 220).

Both Petitioners and Respondent filed Motions for Summary Judgment (R. 62-92 and R. 14-55 respectively), and each thereafter filed Supplemental Briefs (R. 122,210 and R. 216, respectively). Oral argument was held on August 13, 1975 and ruling and order finally made and entered on June 18, 1976 (R. 223-224). Appeal to the Georgia Court of Appeals was filed. The Court of Appeals sustained the trial court's grant of Summary Judgment to the Respondent and denial of Summary Judgment to the Petitioners, the report of that case appearing at 141 Ga. App. 134, copy attached in Appendix, P. 15-19. Motion for Rehearing was filed on January 21, 1977 and denied on January 11, 1977. Appendix P. 29.

Application for Writ of Certiorari to the Georgia Supreme Court was filed on February 28, 1977 and denied on April 21, 1977. Motion for Rehearing in the Supreme Court was filed May 2, 1977 and denied on May 11, 1977. See Appendix, p. 30.

Petitioners primary contentions were: (1) that the previous adjudication of the deficiency balance against them in South Carolina to which they were named parties, but not properly

(1) Georgia Code Annotated on this subject reads as follows:

"67-1503. *Confirmation of sales under powers* — When any real estate is sold on foreclosure, without legal process, under powers contained in security deeds, mortgages or other lien contracts, and at such sale said real estate does not bring the amount of the debt secured by such deed, mortgage, or contract, no action may be taken to obtain a deficiency judgment unless the person instituting the foreclosure proceedings shall, within 30 days after such sale, report the sale to the judge of the superior court of the county in which the land lies for confirmation and approval and obtains an order of confirmation and approval thereon."

"67-1504. *Payment of true market value as condition precedent to confirmation of sale*. The court shall require evidence to show the true market value of the property sold under such powers, and shall not confirm the sales unless he is satisfied the property so sold brought its true market value on such foreclosure sale."

served and which stands of record in the state of its rendition, unreversed or set aside, barred the bringing of the instant suit, especially since that judgment had been refused full faith and credit under Count I of this same litigation upon attempt to domesticate the judgment (R. 96), (2) that having had no notice of nor hearing in South Carolina as to the fair market value, the deficiency judgment was invalid against them for any purpose (R. 96) and; (3) that Count II did not give notice of nor was a fair market value hearing held in order to bind them to any deficiency balance found on summary judgment, confirmation of the deficiency being a condition precedent of collection of a deficiency balance under a foreclosure sale in Georgia. See Footnote (1).

Petitioners only connection with the transaction out of which both the South Carolina Judgment and the Georgia litigation arose was the execution of a guaranty agreement, the pertinent portion of which reads as follows: (R. 28-30).

"For valuable consideration, the undersigned (hereinafter called "guarantors") for themselves, their heirs, personal representatives and assigns, hereby jointly and severally, unconditionally guarantee to R.A. Krause, as nominee of the Trustees of ATICO Mortgage Investors, a Massachusetts Business Trust, with power to satisfy, discharge, release, foreclose, assign and/or transfer the within guaranty, and to execute deeds of conveyance and deed restrictions, and to designate a substitute nominee in his stead (hereinafter called "mortgagee") and its successors, participants, endorsers, or assigns, the due performance and full and prompt payment, whether at maturity or by acceleration or otherwise, of and all obligations and indebtedness of Concord Developers, Inc., West Concord, South Carolina, (hereinafter called "Borrowers") to Mortgagee pertaining to the development and/or construction loans (or evidenced in the documents now or hereafter supporting same) made by the Mortgagee aforesaid for the improvement of land, lying and being in the city of West Columbia, County of Lexington, State of South Carolina, more particularly described as follows: . . ."

The trial court's ruling merely granted Summary Judgment to Respondent and denied Summary Judgment to Petitioners, (R. 223,224), without separating or indicating the

grounds therefor. Petitioners appeal embraced all of the affirmative defenses raised at the trial level, as well as general summary judgment law as to genuine issues of material fact. The Court of Appeals held, in short, that Count II was a mere suit on the guaranty contract (Division 2 of the opinion) and had nothing to do with the South Carolina judgment, that the plea of res judicata was "inopposite" and was virtually silent as to the due process defenses (Appendix P. 21). The result is two judgments against the Petitioners — one in South Carolina for \$142,749.91, (R. 42,43 — 151-152), and the instant judgment in Georgia for \$201,562.48, (R. 233-224), for the exact same debt, growing out of the same transaction and guaranty agreement.

REASONS FOR GRANTING THE WRIT

1. *The decision below conflicts with decisions of this Court as to what due process is in general and what constitutes a full and fair hearing under the United States Constitution, Amendments Five and Fourteen.*

Petitioners contend that under the facts and circumstances of this case, they have been denied the due process to which they were entitled by virtue of the U.S. Constitution, Amendments Five and Fourteen, and that this Court should accept the Writ of Certiorari to reverse the Georgia Court of Appeals on this question.

The Statement of the Case shows the procedural history of the judgment here sought to be reviewed. Petitioners have been found liable to pay a deficiency balance arising from a real estate foreclosure sale in South Carolina, covered by a construction loan from Respondent for which they were guarantors, without notice or hearing as demanded by the aforesaid amendments to the U.S. Constitution, in either the State of South Carolina where the foreclosure took place or in the State of Georgia as shown under Section 2 hereof. This Section shall deal solely with the South Carolina proceedings resulting in the judgment there which was subsequently allowed to be used as evidence of "fair market value" in Georgia in the litigation below when the trial court had already refused the South Carolina judgment full faith and credit for lack of proper service. The Georgia Court of Appeals addressed the constitutional issues raised in the trial court by amendment in division 2 of its opinion (App. P. 21)

by stating:

"Appellants next contend as error that the summary judgment was based upon a judgment obtained in South Carolina against them without notice or opportunity to be heard in that state. The basis for the action against appellants in this state was the guaranty contract, not the South Carolina judgment. Their liability under the guaranty was reduced by the net amount of the foreclosure proceedings in South Carolina. If Appellants contend that the valuation established in the South Carolina foreclosure proceedings, to which this court gave full faith and credit as to the husbands of these parties in the previous appearance here, was less than fair market value, they neither alleged nor offered proof of a valuation different from that established in the South Carolina action."

Herein lies the crux of the Georgia Court's error in this case. This Court has held time and time again too numerous to be mentioned that the two fundamental principles or minimal requirements of due process are notice and opportunity to be heard or to defend. *Aetna Insurance Company v. Hartshorn*, 477 F. 2d 97 (1973); *Mathews v. Eldridge*, 96 S. Ct. 893, (1976); *North American Van Lines, Inc. v. Harper's Magazine Co.*, 537 F. 2d 758 (1976); *Council of Federated Organizations v. Mize*, 339 F. 2d 898 (1974); *Techem Chemical Co., Ltd., v. M/T Choyo Maru*, 416 F. Supp. 960 (1976); *Sniadack v. Family Finance Corp.*, 395 U.S., 337, 89 S. Ct. 1820, (1969); *Fuentes v. Shevin*, 407 U.S. 67, 92 S. Ct. 1983, (1972).

Yet the Georgia Court of Appeals, disregarding completely the mandates of the Supreme Court of the United States, has held that these Petitioners can be held liable for a judgment in Georgia by resort to and use of another judgment from South Carolina which was admittedly without due process and refused full faith and credit on that basis. While it, on the one hand, denies the judgment from South Carolina domestication in Georgia, it has by its ruling sanctioned its use for the purpose of binding petitioners to the result of the judgment when it meets none of the minimum requirements of due process.

Petitioners were given no notice of default by the maker of acceleration of the note. No notice was given them of the

complaint for foreclosure in South Carolina. No notice was given them of the foreclosure order entered in South Carolina. No notice was given them of the foreclosure sale in South Carolina. No notice was given them of the intent to hold a fair market value hearing in South Carolina for the purpose of determining the deficiency. No notice was given them of the deficiency balance remaining as found by the South Carolina Court. No notice was given them of the deficiency judgment against them. No notice was given them that they had a right following the foreclosure sale to contest the value within a ninety (90) day period following the sale, as provided by the South Carolina statutory law regarding foreclosures.²

(2) South Carolina General Statutes, Mortgages, etc. Generally Chapter 2, Section 45-86 reads as follows:

§ 45-86 *Deficiency judgment.* In actions to foreclose mortgages the court may adjudge and direct the payment by the mortgagor of any residue of the mortgage debt that may remain unsatisfied after a sale of the mortgaged premises in cases in which the mortgagor shall be personally liable for the debt secured by such mortgage and if the mortgage debt be secured by the covenant or obligation of any person other than the mortgagor the plaintiff may make such person a party to the action and the court may adjudge payment of the residue of such debt remaining unsatisfied after a sale of the mortgaged premises against such other person and may enforce such judgment as in other cases. (1952 Code §45-86, 1942 Code §487; 1932 Code §§487, 8712; Civ. C. '22 §5232; Civ. P. '22 §430; Civ. C. '12 §3468; Civ. P. '12 §218; Civ. C. '02 §2382; Civ. P. '02 §188; 1870 (14) 190; 1894 (21) 816; 1900 (23) 349; 1935 (39) 406.)

South Carolina General Statutes, Executions and Judicial sales generally, Chapter 20, Section 10-1782 reads as follows:

§10-1782. Same; confirmation of sale and deed. — If no objection as to the price at which the property may have been sold by the judgment debtors shall be made in writing by either of the judgment creditors and filed with the sheriff within three months from and after the time such payment shall have been made, the sale shall thereupon be considered confirmed, and the sheriff shall make the following endorsement on the back of the deed of conveyance, viz.: "No objection having been filed in my office to the within bargain and sale within the time prescribed by law this bargain and sale is therefore confirmed." Such endorsement shall be dated and signed officially by the sheriff. (1952 Code §10-1782; 1942 Code §9079; 1932 Code §9081; Civ. C. '22 §5486; Civ. C. '12 §3707; Civ. C. '02 §2622; G.S. 687; R.S. 2122; 1872 (14) 604).

Absent notice as shown above, the crucial hearing requirement of due process was effectively eliminated. The record from South Carolina, combined with the dismissal order in the Georgia proceeding denying full faith and credit to the South Carolina judgment, stands as proof positive of the denial of due process claimed by the petitioners beginning in the trial court. To allow that infected South Carolina judgment to be offered and used as the proof of fair market value against them in the Georgia proceeding as held by the Georgia Court of Appeals is to further compound the denial of due process to them already inflicted in South Carolina. The Georgia Court of Appeals at Division 2 of the opinion (Appendix P. 21) apparently considered the notice and hearing afforded the husbands of these parties to have satisfied the due process guaranteed these petitioners. Due process by osmosis is not contemplated by the Fifth and Fourteenth Amendments.

2. *The decision below conflicts with decisions of this Court as to the notice of a claim asserted as required by virtue of the U. S. Constitution, Amendment Five and Amendment Fourteen and specifically in this case the holding of a hearing of fair market value in order to be able to adjudge the petitioners liable for an in personam judgment for a deficiency balance; and the failure to give such notice and hold such hearing when specifically required by Georgia statutory law constitutes a denial of equal protection of the law as guaranteed by said amendments to the U.S. Constitution.*

As shown above in the Statement of the Case, the petitioners were served in Georgia with a complaint seeking to domesticate a South Carolina judgment. Prior to the summary judgment proceeding and argument thereon, Respondent amended the complaint to resue on the note guaranteed by petitioners alleging the execution of the note, guaranty agreement, the South Carolina foreclosure, etc., seeking inter alia, attorneys fees, plus judgment for the difference between the note amount and the bid price of the property in South Carolina,—or the deficiency resulting from the foreclosure. Said complaint as amended, constituted and can be construed from its allegations as no more than a suit

on a note. No hearing was sought for the purpose of determination of fair market value and no law was plead vitiating that requirement. (R. 14-17). (See also, Footnote [1], under Section 1 hereof). No notice of such hearing was given and no such hearing was held, yet judgment was rendered on summary judgment against Petitioners.

Inherent in the right to due process guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution is the right to a hearing. This right to a hearing denotes a "full and fair hearing" and includes not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party to meet them. *Morgan v. United States*, 304. U.S. 1; 58 S. Ct. 773, 82 L. Ed. 1129 (1938); *Hill v. EPC*, 335 F. 2d, 355, (5th Cir. 1964); *E.B. Miller & Co. et al v. Federal Trade Commission*, 142 F. 2d 511 (6th Cir. 1944).

The due process clause of the Fifth Amendment guarantees no particular mode of procedure, but, does require adequate notice of opposing claims, reasonable opportunity to prepare and to meet them in an orderly hearing adapted to the nature of the case and a fair and impartial decision. *Brotherhood of Railroad Trainmen v. Chicago, M. St. P.&P.R. Co.*, 237 F. Supp. 404, (1964); *North American Van Lines, Inc., v. United States*, 412 F. Supp. 782 (1976); *Salvino v. United States, et al*, 119 F. Supp. 277 (1954); *Burton, et. al, v. Platter*, 53 Fed. 901 (1893); *United States v. Dillman, et. al*, 146 F. 2d 572 (5th Cir. 1944); *Brotherhood R.R. Trainmen v. Swan*, 214 F. 2d, 56 (7th Cir. 1954).

It has also been held time and time again that due process to be effective must be accorded at a meaningful time and in a meaningful manner. *Armstrong v. Manzo*, 380 U.S. 545, 552; 85 S. Ct. 1187; 14 L. Ed. 2d 62, (1965); *Royal Typewriter Company v. National Labor Relations Board*, 533 F. 2d 1030, (1976).

The case of *Ricker v. United States*, 417 F. Supp., 133 (1967), although dealing with a Farmer's Home Administration foreclosure, sets forth the notice and hearing requirements to which a mortgagor is entitled under the Fifth Amendment to the U.S. Constitution, and holds at Headnote 5 that:

"Although requirements of due process may vary with

differing circumstances, procedural due process demands at minimum notice and opportunity to be heard."

Again at Headnote 10 that same case holds:

"Formality and procedural requisites for due process hearing can vary, depending on the importance of the interests involved and nature of the proceedings, but the Constitution requires meaningful and timely opportunity to be heard."

Guaged by the dictates of the *Ricker* standard, although the Georgia Statutory Law (Footnote [1]) adequately provides for and protects the requirements of due process enunciated by the United States Constitution, its application to the facts of this case is devoid of the minimum standard of notice and meaningful and timely opportunity to be heard.

A diligent search has resulted in no case ruled on by this Court directly on point. However, the case of *Carter v. Kubler*, 64 S. Ct. 1, 320 U.S. 243, (1943), is a bankruptcy case involving the valuation of the debtor's land on a petition for reappraisal, involving the same principle involved in the case at bar. The fair market value of the land foreclosed in South Carolina for the purpose of determining a deficiency for which petitioners might ultimately be responsible under their guaranty is analagous to the valuation of the debtor's land in *Carter, supra*. The court there held that the parties were entitled to a valuation based on strict adherence to the procedure followed, under the Bankruptcy Act, citing *Moser v. Mortgage Guarantee Co.*, 9 Cir. 123 F. 2d, 423. Using that same rationale, the Georgia Court should have afforded the Petitioners a hearing on the "fair market value" of the property and that hearing should have been a fair and full hearing. This is especially true since Georgia law makes it a condition precedent to the collection of a deficiency that fair market value be determined and imposes a relative short period after foreclosure to file for confirmation. In *Carter, supra* at Page 3, Section (2, 3) the Court stated: "The basic elements of such a hearing include the right of each party to be apprised of all the evidence upon which a factual adjudication rests, plus the right to examine, explain or rebut all such evidence." The failure to provide such a hearing in accordance with the Georgia Statute, having ruled that Georgia law applied (Appendix P. 23 Division 5 of the

Opinion) constitutes not only a denial of the due process clause but also the equal protection clause of the 5th and 14th Amendment to the United States Constitution.

The Georgia trial court, affirmed by the Georgia Court of Appeals, ruled on the one hand that Georgia law applied to the facts of this case, but then immediately ignored the statutory mandate, contrary to its own prior decisions in this area and contrary to the constitutional safeguards set out in the statute. Not only was the requisite hearing omitted, but summary judgment was granted by the allowance of the use of the same South Carolina judgment already refused full faith and credit earlier in the case, as proof of fair market value, without notice that any such hearing was to be held, or that the complaint, as amended, was in fact a confirmation proceeding, giving petitioners the right to adduce evidence in rebuttal thereof.

In the final analysis, the Georgia Court refused to domesticate the foreign judgment, but, allowed the domestication of its results, i.e., bound the petitioners to the fair market value found in South Carolina without notice or opportunity to be heard in either state. The due process guaranteed by the U.S. Constitution demands far more than that afforded these petitioners. The decision below cannot be justified when measured against even the minimum standard of due process.

3. *The decision below conflicts with decisions of this Court as to the proper application of a plea of res judicata and is a denial of due process as guaranteed by the U.S. Constitution, Amendments Five and Fourteen.*

Usually questions of the application of the doctrine of res judicata are to be determined under state law. However, a decision of a state court which denies asserted federal rights in the application of the doctrine of res judicata if such application is clearly inconsistent with the right to due process of law will not preclude this court from reviewing and correcting the state court's error. *Postal Telegraph Cable Company v. City of Newport, Kentucky*, 247 U.S. 464 (1917).

Petitioners here contend that the failure by the Georgia Court of Appeals to correctly apply the doctrine of res judicata in the case below by recognizing the South Carolina

judgment against them as a complete bar to Count II, is such an error that it denies them of their fundamental right to due process. The improper application of the affirmative defense of res judicata in the decision by the Georgia Court of Appeals is so ill-founded and so intimately interwoven with the constitutional defenses raised by them in the trial court and ruled on by the Court of Appeals of Georgia that this Court's review of the entire case below is warranted although the issue of res judicata may be a non-federal question. *State Tax Comm'n v. Van Colt*, 306 U.S. 511; *Enterprise Irrig. Dist. v. Farmers' Mutual Canal Co.*, 243 U.S. 157, 164; cf. *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275; *Chicago Burlington and Quincy Railway Company v. People of the State of Illinois ex rel Drainage Commissioners*, 200 U.S. 561; *West Chicago Street Railroad Company v. People of the State of Illinois, ex. rel. City of Chicago*, 210 U.S. 506; *Wood v. Chesborough*, 228 U.S. 672, (1912).

It is clear from a comparative analysis of this record below and the record of the South Carolina action (R. 146-209) that the debt sued on by the Respondent in the instant case is exactly the same debt as already reduced to judgment in South Carolina. It is likewise abundantly clear that the parties to the instant action are the exact same parties, and it is unquestioned that the South Carolina judgment is of record in that state against Petitioners since under Count I, it was offered in Georgia in certified form for domestication as well as used by the Respondent as proof of fair market value in the current suit under Count II, (App. P. 20 Court of Appeals Opinion Division 1). Thus, all elements of a valid plea of res judicata have been satisfied.

The failure of the Court of Appeals of Georgia to reverse the trial Court and sustain the plea has resulted in a denial of due process to these Petitioners in that they have again been subjected to judgment for the same cause of action and two judgments now stand against them. True, the judgments differ in amount, but each are valid, final and binding. As an example of their validity, if the Respondent were to find property or assets of Petitioner in a third state, it could take either the South Carolina judgment or the Georgia judgment and seek domestication in such foreign state and Petitioners would again be put to defending the reduction of the South

Carolina judgment, if it were the one chosen, on the grounds of full faith and credit as it successfully did under Count I in Georgia. Surely the law does not contemplate that a Defendant once she has a judgment against her, can or should be again vexed with litigation upon that exact same cause ad infinitum. Thus, the doctrine of res judicata was created which is the civil counterpart of double jeopardy against which the Fifth Amendment to the U.S. Constitution guarantees protection. *Mayor of Aldermen of the City of Vicksburg v. Henson, Receiver of Vicksburg Water Works Company*, 231 U.S. 259 (1913). While Applicants have located no case directly on point so that the question here presented appears to be of first impression, this court has conversely found that the erroneous sustaining of a plea of res judicata is a denial of due process. See *Postal supra*. Petitioners submit that the misapplication of a valid plea of res judicata by failing to apply it when the facts, as here, not only warrant but demand its application in bar, is a denial of due process and equal protection. See Section 1 of this Application for a full discussion of the specific constitutional issues. The failure by the Court of Appeals of Georgia to correctly sustain the plea of res judicata has compounded the denial of due process originally denied Petitioners in South Carolina and Georgia.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should be issued to review the judgment and opinion of the Georgia Court of Appeals.

Respectfully submitted,

BY:

Ruby Carpio Bell
Attorney for Applicants

BELL & DESIDERIO, P.C.
Suite 900
3445 Peachtree Road, N.E.
Atlanta, Georgia 30326
Telephone: 404-261-6235

JANUARY TERM, 1977 APPENDIX A

53160. COLODNY et al. v. KRAUSE.

WEBB, Judge.

Krause as trustee for Atico Mortgage Investors sought to enforce a deficiency judgment obtained in South Carolina against Mr. and Mrs. Colodny and Mr. and Mrs. Feldman in a realty mortgage foreclosure proceeding. All four are residents of Georgia. Mesdames Colodny and Feldman had not been properly served in the South Carolina deficiency judgment proceeding, and their motion to dismiss on that ground was sustained. The trial court by summary judgment sustained, however, the deficiency judgment against Messrs. Colodny and Feldman, and we affirmed. *Colodny v. Krause*, 136 Ga. App. 379 (221 SE2d 239) (1975).

Count 2 of Atico's complaint based upon a guaranty contract executed by the four individuals, and not then before us, thereafter was adjudicated by the trial court as to Mesdames Colodny and Feldman. Their motion for summary judgment was denied, and summary judgment was entered for Atico against these two for \$201,562.48.

Mesdames Colodny and Feldman make a six-pronged assault upon the summary judgment in their appeal to this court, and we shall deal with the alleged errors in the orders presented.

1. Appellants assert error by the trial court in denying their motion for summary judgment in that Atico's action "is barred by the doctrine of res judicata" by virtue of the deficiency judgment proceeding in South Carolina.

The South Carolina judgment was *res judicata* as to the husbands of these appellants, in that the husbands were served, and the judgment was entitled to full faith and credit. *Colodny v. Krause*, p. 380. But Mesdames Colodny and Feldman were never served in the South Carolina proceeding. It is fundamental that the legal liability of one person to another person can be ascertained only in an action brought against such person by the other in a court of competent jurisdiction. Code §§ 3-607, 110-501. "A judgment is not conclusive as to one who was not a party to the proceeding in

which it was rendered, nor as to one over whom the court acquired no jurisdiction, even though the latter may be named as a party defendant in the proceeding." *Smith v. Downing Co.*, 21 Ga. App. 741, 742 (9) (95 SE 19) (1917). See also *Patrick v. Simon*, 237 Ga. 742, 743 (2) (1976).

Where a verdict and judgment are had against two defendants, on a joint and several contract, and it appears that one was never served, the verdict and judgment as to the one not served are void. *Kitchens v. Hutchins*, 44 Ga. 620 (4) (1872); *Hicks v. Bank of Wrightsville*, 57 Ga. App. 233, 234 (1) (194 SE 892) (1938).

"A personal judgment can not be obtained against a person who is not named as a party defendant and properly served in the action." (Emphasis supplied.) *Webb & Martin, Inc. v. Anderson-McGriff Hardware Co.*, 188 Ga. 291 (2) (3 SE2d 882) (1939); *Burgess v. Nabers*, 122 Ga. App. 445, 447 (2) (177 SE2d 266) (1970). The South Carolina judgment was rendered by a court which lacked jurisdiction of the two appellants, was a nullity and not final as to them, and appellants' plea of res judicata must fail. *Gilmer v. Porterfield*, 233 Ga. 671 (212 SE2d 842) (1975) upon which appellants place reliance is inapposite here.

2. Appellants next content as error that the summary judgment was based upon a judgment obtained in South Carolina against them without notice or opportunity to be heard in that state. The basis for the action against appellants in this state was the guaranty contract, not the South Carolina judgment. Their liability under the guaranty was reduced by the net amount of the foreclosure proceedings in South Carolina. If appellants contend that the valuation established in the South Carolina foreclosure proceeding, to which this court gave full faith and credit as to the husbands of these parties in the previous appearance here, was less than fair market value, they neither alleged nor offered proof of a valuation different from that established in the South Carolina action.

3. Appellants contend that Atico did not comply with Georgia's confirmation procedures set forth in Code Ann. §67-1503. The real estate foreclosed upon is in South Carolina. *Goodman v. Nadler*, 113 Ga. App. 493 (148 SE2d 480) (1966) applies here, wherein the same argument was

made. We held that Georgia's confirmation statute (§67-1503) "is obviously drawn so as to apply only to foreclosure sales in Georgia." *Ibid*, p. 495. And, "[t]he plaintiff is not barred, under these circumstances, from bringing the action in personam in the county of the defendants' residence because of any requirement contained in Code §37-608." *Ibid*, p. 496.

Appellants argue that to allow Atico to obtain a personal judgment against them for deficiency would be against the public policy of this state. "Where the question [public policy] has arisen in other jurisdictions it has generally been held that recovery of a deficiency judgment otherwise allowable under the law of the situs of the mortgaged property and the contract indebtedness which it secures is not violative of the public policy of the state of the forum on grounds of public policy although contrary to the rule in effect in such state. [Cits.] The strongest ground of public policy which occurs for the enforcement of statutes requiring confirmation in foreclosure proceedings is to protect the debtor from being subjected to double payment in cases where the property was purchased for a sum less than its market value. Code §37-609 requires that evidence satisfactory to the court of the true market value of the property is a condition precedent to the confirmation. We reach the same conclusion on an action in Georgia based on a Florida judgment and applying Florida law, for in Florida a nonresident mortgagor not personally served in the foreclosure proceeding is not bound by the amount brought in at the foreclosure sale, but may offer evidence to show the true value of the property. The traditional test used in determining whether the public policy of the forum prevents the application of otherwise applicable conflict-of-laws principles was well expressed by Justice Cardozo in *Loucks v. Standard Oil Co. of N.Y.*, 224 N.Y. 99 (120 NE 198), to the effect that foreign law will not be applied if it 'would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.' No such reason exists here." *Goodman v. Nadler*, supra, pp. 496, 497. (See 44 ALR3d 927, §3).

4. Appellants argue that the denial of their motion for summary judgement was error in that their risk under the

guaranty agreement has been increased and they have been discharged.

There is no merit in this contention. Atico obtained a judgment against the other two guarantors, husbands of appellants, and in this action Atico is pursuing appellants for a judgment on the same guaranty that underlay the deficiency judgment entered in South Carolina and to which this state gave full faith and credit as to the husbands. There has been no release of anyone, and no risk has been increased to the appellants. Furthermore, the guaranty agreement which these appellants signed provides, among other things, "a separate action or action may be brought and prosecuted against guarantors . . ." Also, "guarantors authorize mortgagee . . . without affecting their liability . . . to (d) release or substitute any one or more of the endorsers or guarantors," and "guarantors waive any right or claim of right . . . to require mortgagee to proceed against the guarantors in any particular order."

Even if there had been a release of parties liable, under the terms of the guaranty contract these two guarantors were not thereby discharged. We consider *Overcash v. First Nat. Bank*, 115 Ga. App. 499 (155 SE 2d 32) (1967) (cert. den.) to be applicable. Chief Judge Felton, speaking for this court, held that the alteration by the credit bank of a contract of suretyship "by the release of one of the three original sureties and the substitution of a new surety therefor did not discharge the other two original sureties, defendants, since such novation was authorized by a provision in the contract to the effect that the bank could surrender any kind of security it held and substitute any kind of collateral for the indebtedness without notice to or further consent of the sureties."

Atico here simply was trying to get Mrs. Colodny and Mrs. Feldman to do that which they promised; nothing more, nothing less.

5. We agree with appellants' assertion that the laws of Georgia must be applied. The law of Massachusetts, referred to in the guaranty as applicable to that contract, will be taken as not contrary to the law of Georgia. *White Farm Equipment Co. v. Jarrell & Clifton*, 139 Ga. App. 632, 634 (2) (229 SE2d 113) (1976); *Craig v. Craig*, 53 Ga. App. 632,

636 (4) (186 SE 755) (1936). We find no error here.

6. The final argument of appellants is that genuine issues of fact remain to be determined. All of their arguments as to this contention focus on the value of the real estate foreclosed upon. Appellants never by pleading or any sort of evidence, affidavit or otherwise, asserted that the property was worth more than \$400,000 received in the South Carolina foreclosure. Had they so desired to raise this question and make it an issue of fact, they should have pleaded the issue or attempted to prove a different value by affidavit or other evidence. Atico had submitted with its pleadings a property authenticated copy of the special referee's report of sales submitted in the South Carolina confirmation proceeding, which showed the mortgaged property was sold for \$400,000. There was no evidence of value other than this amount. Appellants' own motion for summary judgment also would seem to indicate that to them there was no issue of fact. Atico having shown a value of the land foreclosed upon, the burden shifted to appellants to show a different amount, and this they failed to do. Compare *Heimanson v. Meade*, 140 Ga. App. 534 (1976).

Judgment affirmed. Deen, P.J., and Marshall J., concur.

SUBMITTED JANUARY 5, 1977 – DECIDED JANUARY 11, 1977 – REHEARING DENIED JANUARY 28, 1977 – CERT. APPLIED FOR.

Action on judgment. Fulton Superior Court. Before Judge Tanksley.

Bell & Desiderio, Ruby Carpio Bell, for appellants.

Kidd, Pickens & Tate, Charles M. Kidd, for appellee.

JANUARY 11, 1977
APPENDIX B

In the interest of time, this opinion is sent to you without proofreading or other editorial inspection. It will be appreciated if counsel will notify the clerk of the discovery of typographical errors.

53160. COLODNY et al. v. KRAUSE.

WEBB, Judge.

Krause as trustee for Atico Mortgage Investors sought to enforce a deficiency judgment obtained in South Carolina against Mr. and Mrs. Colodny and Mr. and Mrs. Feldman in a realty mortgage foreclosure proceeding. All four are residents of Georgia. Mesdames Colodny and Feldman had not been properly served in the South Carolina deficiency judgment proceeding, and their motion to dismiss on that ground was sustained. The trial court by summary judgment sustained, however, the deficiency judgment against Messrs. Colodny and Feldman, and we affirmed. *Colodny v. Krause*, 136 Ga. App. 379 (221 SE2d 239) (1975).

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3. Appellants contend that Atico did not comply with Georgia's confirmation procedures set forth in Code Ann. § 67-1503. The real estate foreclosed upon is in South Carolina. *Goodman v. Nadler*, 113 Ga. App. 493 (148 SE2d 480) (1966) applies here, wherein the same argument was made. We held that Georgia's confirmation statute (§ 67-1503) "is obviously drawn so as to apply only to foreclosure sales in Georgia." *Ibid*, p. 495. And, "[t]he plaintiff is not barred, under these circumstances, from bringing the action in personam in the county of the defendants' residence because of any requirement contained in Code § 37-608." *Ibid*, p. 496.

Appellants argue that to allow Atico to obtain a personal judgment against them for deficiency would be against the public policy of this state. "Where the question [public policy] has arisen in other jurisdictions it has generally been held that recovery of a deficiency judgment otherwise allowable under the law of the situs of the mortgaged property and the contract indebtedness which it secures is not violative of the public policy of the state of the forum on grounds of public policy although contrary to the rule in effect in such state. [Cits.] The strongest ground of public policy which occurs for the enforcement of statutes requiring confirmation in foreclosure proceedings is to protect the debtor from being subjected to double payment in cases where the property was purchased for a sum less than its market value. Code § 37-609 requires that evidence satisfactory to the court of the true market value of the property is a condition precedent to the confirmation. We reach the same conclusion on an action in Georgia based on a Florida judgment and applying Florida law, for in Florida a nonresident mortgagor not personally served in the foreclosure proceeding is not bound by the amount brought in at the foreclosure sale, but may offer evidence to show the true value of the property. The traditional test used in determining whether the public policy of the forum prevents the application of otherwise applicable conflict-of-laws principles was well expressed by Justice Cardozo in *Loucks v. Standard Oil Co. of N.Y.*, 224 N.Y. 99 (120 NE 198), to the effect that foreign law will not be applied if it 'would violate some fundamental principle of justice, some prevalent conception

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6. The final argument of appellants is that genuine issues of fact remain to be determined. All of their arguments as to this contention focus on the value of the real estate foreclosed upon. Appellants never by pleading or any sort of evidence, affidavit or otherwise, asserted that the property was worth more than \$400,000 received in the South Carolina foreclosure. Had they so desired to raise this question and make it an issue of fact, they should have pleaded the issue or attempted to prove a different value by affidavit or other evidence. Atico had submitted with its pleadings a property authenticated copy of the special referee's report of sales submitted in the South Carolina confirmation proceeding, which showed the mortgaged property was sold for \$400,000. There was no evidence of value other than this amount. Appellants' own motion for summary judgment also would seem to indicate that to them there was no issue of fact. Atico having shown a value of the land foreclosed upon, the burden shifted to appellants to show a different amount, and this they failed to do. Compare *Heimanson v. Meade*, 140 Ga. App. 534 (1976).

Judgment affirmed. Deen, P.J., and Marshall J., concur.

SUBMITTED JANUARY 5, 1977 – DECIDED JANUARY 11, 1977 – REHEARING DENIED JANUARY 28, 1977 – CERT. APPLIED FOR.

Action on judgment. Fulton Superior Court. Before Judge Tanksley.

Bell & Desiderio, Ruby Carpio Bell, for appellants.

Kidd, Pickens & Tate, Charles M. Kidd, for appellee.

APPENDIX C

IN THE SUPERIOR COURT OF FULTON COUNTY STATE OF GEORGIA

R.A. KRAUSE, as Nominee of
the Trustees of ATICO Mortgage
Investors, a Massachusetts
Business Trust,

CIVIL ACTION NO. C-426

vs.

LESTER B. COLODNY, ROSALYN A.
COLODNY, RICHARD FELDMAN and
JEAN FELDMAN.

THIRD AMENDMENT TO
ANSWER

Now comes the Defendants, ROSALYN A. COLODNY and JEAN FELDMAN, and make this their third amended answer by showing the Court as follows:

1.

Defendants, ROSALYN A. COLODNY and JEAN FELDMAN hereby adopt and reaffirm en toto their first and second amended answers in this case as specifically as if set out herein.

2.

Defendants, ROSALYN A. COLODNY and JEAN FELDMAN hereby state a EIGHTH DEFENSE to Plaintiff's complaint, to wit:

EIGHTH DEFENSE

The Plaintiff is not entitled to judgment on its claim because such judgment would be a violation of the due process guaranteed to the Defendants, ROSALYN A. COLODNY and JEAN FELDMAN by the Fifth and Fourteenth Amendments to the Constitution of the United States and the Constitution of Georgia of 1945. (Ga. Code Ann. § 2-103).

Respectfully submitted,

FILED IN OFFICE

BELL & DESIDERIO, P.C.

NOV. 18, 1975

BY:

Ruby Carpio Bell

BY:

Barry Allen
Attorneys for Defendants

Walter W. Miles
DEPUTY CLERK SUPERIOR COURT
FULTON COUNTY GEORGIA

CERTIFICATE OF SERVICE

I hereby certify that I have this day served copies of Defendants' Third Amendment to Its Answer and the Second Supplemental Brief in Support of Defendants' Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment by placing such copies in an envelope, with adequate postage thereon, addressed to:

Charles M. Kidd
Weltner, Kidd, Crumbley & Tate
2130 First National Bank Tower
Atlanta, Georgia 30303

This 18th day of November, 1975.

BELL & DESIDERIO, P.C.

BY:

Ruby Carpio Bell
Attorney for Defendants

IN THE SUPERIOR COURT OF FULTON COUNTY STATE OF GEORGIA

R.A. KRAUSE, as Nominee of
the Trustees of ATICO Mortgage
Investors, a Massachusetts
Business Trust,

CIVIL ACTION NO. C-426

Plaintiffs,

vs.

BOOK 3191, PAGE 35

LESTER B. COLODNY, ROSALYN A.
COLODNY, RICHARD FELDMAN and
JEAN FELDMAN,

FOURTH AMENDMENT TO
ANSWER

Defendants.

Now comes the Defendants, ROSALYN A. COLODNY and JEAN FELDMAN, and make this their fourth amended answer by showing the Court as follows:

1.

Defendants ROSALYN A. COLODNY and JEAN FELDMAN hereby adopt and reaffirm en toto their first and second amended answers in this case as specifically as if set out herein.

2.

In order to correct citation in their third amendment to their answer, the Defendants, ROSALYN A. COLODNY and JEAN FELDMAN hereby amend the Eighth Defense raised in their third amendment to their answer, and do hereby state their Eighth Defense as follows:

EIGHTH DEFENSE

The Plaintiff is not entitled to judgment on its claim because such judgment would be a violation of the due process guaranteed to the Defendants, ROSALYN A. COLODNY and JEAN FELDMAN, by the Fifth and Fourteenth Amendments to the Constitution of the United States and the Constitution of Georgia of 1945, § 2-103 (Ga. Code Ann. § 2-103).

GEORGIA, Fulton County, Clerk's Office Superior Court
Filed & Recorded, December 16, 1975.

Respectfully submitted,

CLERK

BY:

BELL & DESIDERIO, P.C. Ruby Carpio Bell
3445 Peachtree Rd., N.E.
Suite 900
Atlanta, Georgia 30326
(404/261-6235)

BY:

Barry P. Allen
Attorneys for Defendants.

CERTIFICATE OF SERVICE

I certify that I have this day served a copy of the foregoing Fourth Amendment to Answer by placing a copy of the same in an envelope, with adequate postage thereon, addressed to:

Mr. Charles M. Kidd
Weltner, Kidd, Crumbley & Tate
2130 First National Bank Tower
Atlanta, Georgia 30303

This 16th Day of December, 1975.

BARRY P. ALLEN

Bell & Desiderio, P.C.
3445 Peachtree Road, N.E.
Suite 900
Atlanta, Georgia 30326
(404) 261-6235

FILED IN OFFICE
DEC. 16, 1975
Deborah Moore
DEPUTY CLERK SUPERIOR COURT
FULTON COUNTY GEORGIA

APPENDIX D

COURT OF APPEALS OF THE STATE OF GEORGIA ATLANTA, JANUARY 28, 1977

The Honorable Court of Appeals met pursuant to adjournment. The following order was passed:

53160. Rosalyn A. Colodny et al. v. R.A. Krause, etc.

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

Court of Appeals of the State of Georgia
Clerk's Office, Atlanta,
January 28, 1977

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

CLERK.

Court of Appeals
of the State of Georgia

Clerk's Office
Atlanta, June 14, 1977

I hereby certify that the foregoing pages contain a true and correct copy of the Motion for Rehearing and the Order of Denial in Case No. 53160, Rosalyn A. Colodny and Jean Feldman, vs. R.A. Krause, as Nominee of the Trustees of ATICO MORTGAGE INVESTORS, a Massachusetts Business Trust.

Witness my signature and the seal of said Court hereto affixed, the day and year above written.

Clerk, C.A. GA.

SUPREME COURT OF GEORGIA
ATLANTA, APRIL 21, 1977

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

Rosalyn A. Colodny, et al. v. R.A. Krause, etc.

Upon consideration of the Application for Certiorari filed in this case, it is ordered that it be hereby denied. Nichols, C.J., Undercofler, P.J., Jordan, Ingram, Hall and Hill, JJ., concur.

SUPREME COURT OF THE STATE OF GEORGIA,
CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk.

SUPREME COURT OF GEORGIA
ATLANTA, MAY 11, 1977

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

Rosalyn A. Colodny, et al v. R.A. Krause, etc.

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied. All the Justices concur, except Bowles, J., not participating.

SUPREME COURT OF THE STATE OF GEORGIA,
CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

CLERK.

Supreme Court of the State of Georgia
Clerk's Office, Atlanta
June 14, 1977

I hereby certify that the foregoing pages, hereto attached, contain a true and correct copy of the Application for Certiorari, the order denying Application for Certiorari, the Motion for Reconsideration and the order denying the Motion for Reconsideration in the Supreme Court of Georgia in Case No. 32199, Rosalyn A. Colodny et al v. R.A. Krause, etc., as appears from the records and files in this office.

Witness my signature and the
seal of this Court hereto
affixed the day and year
first above written.

Clerk, Supreme Court of Georgia

**APPENDIX E
ATLANTA, JANUARY 11, 1977**

The Honorable Court of Appeals met pursuant to adjournment. The following judgment was rendered:

53160. Rosalyn A. Colodny et al v. R.A. Krause, etc.

This case came before this court on appeal from the Superior Court of Fulton County; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed. Deen, P.J., Webb and Marshall, JJ., concur.

**IT IS ORDERED THAT THE JUDGMENT OF THE
COURT OF APPEALS OF THE STATE OF GEORGIA
IN THE WITHIN STATED CASE, BE AND THE SAME IS
HEREBY MADE THE JUDGMENT OF THIS COURT.**

THIS THE 23rd DAY OF MAY, 1977.

JUDGE FULTON SUPERIOR COURT, A.J.C.

BILL OF COSTS, \$30.00

Court of Appeals of the State of Georgia
Clerk's Office, Atlanta,
May 20, 1977

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia, and that

RUBY CARPIO BELL

paid the above bill of costs.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

CLERK.

FILED IN OFFICE

MAY 23, 1977

**DEPUTY CLERK SUPERIOR COURT
FULTON COUNTY GEORGIA**

BOOK 831, PAGE 357

Court of Appeals
of the State of Georgia

CERTIFICATE OF SERVICE

I hereby certify that I have this date served the Respondent with a copy of this Notice of Intent to Apply for Writ of Certiorari to the United States Supreme Court by serving a copy thereof upon its Counsel or Record, Charles M. Kidd, Kidd, Pickens & Tate, 2130 First National Bank Tower, Atlanta, Georgia 30303, by depository of same in the U.S. Mail, properly addressed with adequate postage thereon to assure delivery.

This day of August, 1977.

BELL & DESIDERIO, P.C.

BY:

Ruby Carpio Bell
Attorney for Applicants

3445 Peachtree Road, N.E.
Suite 900
Atlanta, Georgia 30326
Telephone: 404-261-6235